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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIE MITCHELL STUCKEY,

Defendant and Appellant.

E053618

(Super.Ct.No. RIF129285)

OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner,
Judge. Reversed.

Steven S. Lubliner, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, William M. Wood, and Kathryn
Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

In this appeal, Willie Mitchell Stuckey, defendant and appellant (defendant), contends the trial court erred in failing to conduct a *Marsden*¹ hearing after his attorney asked to be relieved from representation so that defendant could move to withdraw his guilty plea. Defendant also raises two claims of sentencing error, both of which the Attorney General concedes. We agree with defendant's claims, and therefore we will reverse and remand the matter to the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of the underlying crimes are not relevant to the issues defendant raises in this appeal. It is sufficient to note that in March of 2006, defendant committed a number of armed robberies at markets and gas stations. During some of those robberies, defendant used a gun to accomplish the crime.

The procedural details are slightly convoluted due to the trial court's belief, later determined to be incorrect, that defendant's guilty plea was invalid. However, most of those details are not relevant to defendant's claims on appeal. We will limit our recitation to those that are pertinent to our resolution of those claims.

In June 2009, defendant pled guilty to six of 10 counts of robbery alleged in a 15-count amended information. Defendant also pled guilty to one count of attempted robbery and one count of assault with a firearm. In connection with each count, defendant admitted the truth of the related firearm use enhancement. Defendant also pled guilty to two counts of exhibiting a firearm, as misdemeanor violations of the charged

¹ *People v. Marsden* (1970) 2 Cal.3d 118.

crimes of assault with a firearm. Defendant agreed to be referred to probation for a sentence recommendation but the trial court would impose the actual sentence, and that he faced a maximum potential term of 39 years eight months in prison. After accepting defendant's guilty plea, the trial court set sentencing for later in June, and allowed defendant to remain free on bail until that hearing. Defendant failed to appear for sentencing.

Defendant was arrested on a bench warrant a year and six months later, and appeared in court on January 4, 2011. Victor Marshall, the appointed attorney who had represented defendant at the time he entered his guilty plea, could not be present at that hearing so Karen Wesche made a special appearance on his behalf. The trial court set defendant's sentencing hearing for February 18, 2011, with the understanding that Mr. Marshall would represent defendant at that hearing.

Mr. Marshall appeared on defendant's behalf at the February 18, 2011, sentencing hearing. The trial court expressed the belief that defendant's plea was invalid because the trial court had not advised defendant that he was pleading guilty to crimes that constitute strikes under the three strikes law and that therefore would subject him to increased punishment if he were to be convicted in the future of another crime. The trial court told defendant that if his attorney were to make the appropriate motion, the court would allow defendant to withdraw his plea. In response, Mr. Marshall stated that defendant had already expressed his desire to withdraw his guilty plea. Mr. Marshall told the court that he had conveyed that information to the deputy district attorney who had agreed to defendant's guilty plea, and also to the court's clerk.

After a brief recess, the trial court reconvened the hearing and expressed the view that maybe the court had been mistaken, and defendant's plea was not invalid. Therefore, rather than allow an oral motion to withdraw the guilty plea which the trial court earlier had indicated it would permit, the trial court asked for a written motion and written opposition. In the interim, Mr. Marshall asked the court to relieve him as counsel for defendant. The trial court indicated it was not inclined to grant the motion, but when Mr. Marshall explained that "it's a motion to withdraw the plea," the trial court granted that request and appointed Ms. Corcoran to represent defendant.

At a hearing on April 15, 2011, the trial court denied defendant's motion to withdraw his guilty plea.² The court noted that defendant based his motion on mistake, ignorance, and ineffective assistance of counsel. Specifically, defendant claimed, first, that the trial court had not advised him that he was pleading to strike offenses; second, that his trial attorney was ineffective because in making the factual basis for two of the seven robbery counts, his attorney did not say the crimes were accomplished "by force or fear"; and third, that he had not understood his plea was an open plea to the court without an indicated sentence. After denying defendant's motion to withdraw his guilty plea, the trial court wanted to proceed to sentencing, but defendant's attorney objected that he was not there for sentencing, he was there only for plea withdrawal. The trial court then asked Mr. Marshall, who was in court as a potential witness on defendant's motion to

² An attorney named Comings, not Ms. Corcoran, prepared and argued that motion.

withdraw his plea, to come forward and represent defendant.³ With Mr. Marshall and Mr. Comings as his attorneys, the trial court sentenced defendant.

DISCUSSION

Defendant contends the foregoing facts were sufficient to put the trial court on notice of the need to conduct a *Marsden* hearing. We agree.

“The governing legal principles are well settled. ‘Under the Sixth Amendment right to assistance of counsel, “[a] defendant is entitled to [substitute another appointed attorney] if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.’” [Citation.] Furthermore, ““When a defendant seeks to discharge appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance.”” [Citations.]” (*People v. Valdez* (2004) 32 Cal.4th 73, 95.) The event that triggers a *Marsden* inquiry is “some clear indication by defendant that he wants a substitute attorney.” (*Valdez*, at p. 97.)

Defendant contends this case is governed by *People v. Sanchez* (2011) 53 Cal.4th 80 (*Sanchez*), in which the trial court appointed substitute counsel to investigate whether there were any grounds for the defendant to withdraw his guilty plea but did not conduct a *Marsden* hearing. After the substitute attorney determined that the defendant just had

³ The reporter's transcript does not include any statements that indicate the trial court actually appointed Mr. Marshall or relieved Mr. Comings.

buyer's remorse and no grounds existed to withdraw the plea, the trial court reappointed the original attorney and sentenced the defendant. In affirming the Court of Appeal, which reversed the judgment and remanded for the purpose of conducting the *Marsden* hearing, the Supreme Court stated, "[A] trial court is obligated to conduct a *Marsden* hearing on whether to discharge counsel for all purposes and appoint new counsel when a criminal defendant indicates after conviction a desire to withdraw his plea on the ground that his current counsel provided ineffective assistance," but "only when there is 'at least some clear indication by defendant,' either personally or through his current counsel, that defendant 'wants a substitute attorney.' [Citation.]" (*Sanchez*, at pp. 89-90.)

In *Sanchez*, as in this case, the defendant's original attorney asked to be relieved as counsel for defendant. The Supreme Court held defense counsel, by requesting the "appointment of substitute counsel to investigate the filing of a motion to withdraw [the] plea on Sanchez's behalf," (*Sanchez*, *supra*, 53 Cal.4th at p. 86) had indicated the defendant's desire for substitute counsel (*Sanchez*, at p. 90). "[D]efendant, through counsel, requested that a 'conflict' or substitute attorney be appointed immediately, and the obvious implicit ground for that request was the incompetency of defendant's currently appointed counsel." (*Id.* at p. 91.)

The trial court in this case did all the things the Supreme Court disapproved of in *Sanchez*, namely appointing substitute counsel for the limited purpose of pursuing a motion to withdraw a guilty plea and then reappointing original counsel to represent defendant after the motion to withdraw the guilty plea was determined to lack merit.

(*Sanchez, supra*, 53 Cal.4th at p. 90.)⁴ The trial court should not have appointed substitute counsel. Instead, the trial court should have conducted a *Marsden* hearing when defendant’s attorney asked to be relieved as counsel of record so that defendant could pursue his motion to withdraw his guilty plea. (*Sanchez*, at p. 90, fn. 3.)

In *Sanchez*, substitute counsel informed the trial court that no basis existed for the defendant to withdraw his guilty plea, whereas in this case, substitute counsel actually filed a motion to withdraw defendant’s guilty plea and the trial court denied that motion. Defendant contends that distinction is irrelevant. We are inclined to agree.

The focus of *Sanchez* is on the trial court’s failure to follow the proper procedure, namely that a trial court should only appoint substitute counsel after conducting a *Marsden* hearing and concluding that the defendant has demonstrated that his or her right to counsel has been “substantially impaired,” at which time the trial court must appoint substitute counsel as attorney of record for all purposes. (*Sanchez, supra*, 53 Cal.4th at p. 90.) The trial court did not do that in this case.

The Supreme Court’s admonition in *Sanchez* is clear: “[A]t any time during criminal proceedings, if a defendant requests substitute counsel, the trial court is obligated, pursuant to our holding in *Marsden*, to give the defendant an opportunity to state any grounds for dissatisfaction with the current appointed attorney.” (*Sanchez, supra*, 53 Cal.4th at p. 90.) We think a credible argument can be made that defendant again requested substitute counsel at his sentencing hearing when he explained to the trial

⁴ *Sanchez* was filed after the trial court conducted the various hearings at issue in this appeal. Therefore, the trial court cannot be faulted for failing to follow that decision.

court that he pled guilty because Mr. Marshall had told him he faced a 60-year prison sentence, so when Mr. Marshall “came up to me with something, I agreed. I was like, all right. But he said he couldn’t help me. [¶] So the only way I can get a new attorney was to take that deal. That’s the only way I can get a new attorney, which is what I was told. But evidently, it did not take place. But that’s what I was hoping on. That’s all – I didn’t understand. I really didn’t understand.” The trial court viewed defendant’s statement as relevant only to the motion to withdraw his guilty plea, a motion the trial court had already denied. We view that statement as an expression of defendant’s desire for a new attorney. Under *Sanchez*, defendant’s statement triggered the trial court’s duty to conduct a *Marsden* hearing.

In any event, the trial court did not follow the correct procedure in this case. Therefore, we will reverse the judgment and remand the matter to the trial court with directions to ““(1) . . . hold a hearing on [defendant]’s *Marsden* motion concerning his representation by [Mr. Marshall]; (2) if the court finds that [defendant] has shown that a failure to replace his appointed attorney would substantially impair his right to assistance of counsel, the court shall appoint new counsel to represent him and shall entertain such applications as newly appointed counsel may make [which may include a renewed motion to withdraw defendant’s guilty plea]; and (3) if newly appointed counsel makes no motions, [or] any motions made are denied, or [defendant]’s *Marsden* motion is denied, the court shall reinstate the judgment.”” (*Sanchez, supra*, 53 Cal.4th at pp. 92-93 [second, third & fourth bracketed insertions added].)

Because the trial court could reinstate the judgment on remand, and the Attorney General concedes defendant's claims of sentencing error, we will also direct the trial court to correct those errors if it reinstates the judgment. In particular, the trial court shall (1) award defendant a total of 903 days of presentence custody (786 days of actual time and 117 days of conduct calculated to April 15, 2011); (2) reduce the Penal Code section 1202.5 fine from \$70 to \$10 (because the statute directs the fine be imposed "in any case" rather than on each offense), after first determining defendant's ability to pay that fine (Pen. Code, § 1202.5, subd. (a)); and (3) if the court determines defendant has the financial ability to pay the fine, the trial court shall impose the additional penalty assessments and surcharges set out in Penal Code sections 1464, subdivision (a)(1) and 1465.7, subdivision (a), and Government Code sections 76000, subdivision (a)(1), 76000.5, subdivision (a)(1), 70372, subdivision (a)(1), 76104.6, subdivision (a)(1), and 76104.7, subdivision (a).

DISPOSITION

The judgment is reversed and the matter remanded with the following directions: (1) the trial court shall hold a hearing on defendant's *Marsden* motion concerning his representation by Mr. Marshall; (2) if the court finds defendant has shown that a failure to replace his appointed attorney would substantially impair his right to assistance of counsel, the court shall appoint new counsel to represent him for all purposes and shall entertain such applications as newly-appointed counsel may make, including a renewed motion to withdraw defendant's guilty plea; and (3) if newly-appointed counsel makes no motions, or any motions made are denied, or defendant's *Marsden* motion is denied, the

court shall reinstate the judgment with the following modifications: (a) award defendant 903 days of presentence custody; (b) reduce the Penal Code section 1202.5 fine from \$70 to \$10, after first determining defendant's ability to pay; and (c) if the court determines defendant has the financial ability to pay the \$10 fine, the trial court shall impose the additional penalty assessments and surcharges set out in Penal Code sections 1464, subdivision (a)(1) and 1465.7, subdivision (a), and Government Code sections 76000, subdivision (a)(1), 76000.5, subdivision (a)(1), 70372, subdivision (a)(1), 76104.6, subdivision (a)(1), and 76104.7, subdivision (a).

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MCKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.
RICHLI
J.